

The Bronx Health Plan and 1199, National Health and Human Service Employees Union. Case 2–CA–26995

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND HURTGEN

On March 2, 1995, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs. The Respondent filed an answering brief in opposition to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.²

The primary issue in this case is whether the Respondent is a successor employer to Montefiore Hospital and if so, whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by unilaterally setting different terms and conditions of employment for its employees.

Background

The undisputed facts are as follows.

The Respondent is a not-for-profit corporation that provides a prepaid Health Services Plan to Medicaid recipients in lieu of Medicaid. The Respondent's clients are provided a list of approved health care providers and facilities from which to choose a physician or clinic.

The initial planning and developmental stages for what became "The Bronx Health Plan" (TBHP, Inc.) were funded by a grant issued to Montefiore by a private foundation. Montefiore hired a small staff to perform the grant supported work. In February 1986, the Respondent filed its articles of incorporation with the State of New York. However, it did not begin providing the health care service plan to clients until February 1987.

The Respondent began operations with no employees. Montefiore provided all managerial and other staff. On March 27, 1989, the Respondent's arrangement with Montefiore was memorialized in a management services agreement. This agreement expressly stated that Montefiore, on a fee-for-services basis, would provide the Respondent with all its employees, including the managerial employees, necessary to perform all the work required by the Respondent. According to the contract's terms, the

Respondent would, within 5 years, become a regular employer with its own employees.

From the Respondent's incorporation in 1986 until July 1, 1993, Maura Bluestone, although still an employee of Montefiore, served as the Respondent's executive director. The Respondent's operations were considered to be a department within the Medical Center, staffed by Montefiore employees. In addition to Bluestone, Montefiore assigned clerical employees to work for the Respondent. These clerical employees were covered by and paid in accordance with the collective-bargaining agreement between the Union and Montefiore. When new employees were required by the Respondent, Bluestone made requisitions to Montefiore's personnel department and that department hired or transferred employees to the Respondent's operations as needed.

Montefiore is a member of the League of Voluntary Hospitals (the League), an employer-member association. The League has had a series of collective-bargaining agreements with the Union that cover the approximately 3500 Montefiore employees, including the clerical employees assigned to work for the Respondent. In addition to the League contract, Montefiore had a local agreement with the Union defining the units of Montefiore employees that are covered by the various collective-bargaining agreements.

As of mid-1993, Montefiore employed approximately 17 clerical employees who were assigned to the Respondent's operations. All 17 clerical employees were covered by the collective-bargaining agreements between Montefiore and the Union. Despite the fact that the employees working at the Respondent's facility were all employees of Montefiore, there was no interchange between them and the other represented employees of the hospital.

By letter dated March 27, 1993, the Respondent, through its board president, Dr. Robert Massad, notified Montefiore that it was terminating the management services agreement effective June 30, 1993, pursuant to the provisions of the agreement that permitted termination of that agreement by either party with ninety (90) days notice.

On May 5, 1993, Bluestone sent a memo to all employees performing services for the Respondent announcing that the Respondent was preparing to make the transition from Montefiore's management services arrangement to a completely self-managed operation. The memo invited all employees interested in joining the Respondent's staff, following the transition, to submit a general employment application to the Respondent for consideration.

On May 26, 1993, Montefiore's director of employee relations informed each of the unit employees working for the Respondent that their employment with Montefiore would be terminated as of June 30, 1993. These

¹ We agree with the judge that the Respondent and Montefiore are not joint employers of the unit employees for the reasons set forth in his decision.

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

unit employees were classified as “non-budgetary” employees by Montefiore because their wages were paid from a special grant fund account that was not part of Montefiore’s general operating budget. The unit employees were informed that while they were not entitled to any seniority bumping rights within Montefiore’s regular operations, they would receive severance pay pursuant to the collective-bargaining agreements.

On or about June 9, 1993, Union Vice President Nelson Valdez met with Bluestone to discuss the collective-bargaining agreement. During that meeting, Valdez asserted that despite the termination of the management services agreement, the Union would continue to represent the Respondent’s unit employees, and that the terms of Montefiore’s collective-bargaining agreements with the League should remain in effect and apply to the Respondent’s employees. In response, Bluestone asserted that the Respondent is a separate entity, that it had no relationship with the Union, and therefore, no obligation to bargain or assume the terms of the collective-bargaining agreement between Montefiore and the Union. Bluestone asserted further that the Respondent would not have a bargaining obligation to the Union unless and until the Union files a petition seeking to represent its employees and is duly elected by those employees as their collective-bargaining representative.

On July 1, 1993, the Respondent began operating with its own staff of managerial, supervisory, sales,³ and clerical employees. No sale or transfer of any physical or other assets accompanied the termination of the management services agreement. Montefiore never owned any part of the Respondent, nor did the Respondent own any part of Montefiore during the life of the agreement. The Respondent hired 16 of the original 17 unit employees employed by Montefiore prior to July 1, 1993. When the Respondent began operations on July 1, 1993, these 16 employees constituted the Respondent’s entire clerical staff. The Respondent also hired nearly all of the former Montefiore managerial, supervisory, and other nonunit employees associated with the Respondent’s business, including Bluestone. The Respondent’s business of providing the health care services plan to its clients was unaffected by the transition.

On July 6, 1993, Bluestone circulated a memorandum to all employees regarding the Respondent’s leave policies. The memo informed the employees that the new leave policies would be retroactively effective to July 1, 1993. The memo outlined the Respondent’s general leave, vacation, and benefit policies, and promised those employees previously assigned to work for the Respondent by Montefiore that “a personalized memo detailing the status of . . . vacation, sick and personal leave” would

be forthcoming. The memo also indicated that each employee would receive an employee handbook that would “explain the policies and procedures for earning and using leave.”

Analysis

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court set forth the criteria for determining whether a new employer is the successor to the prior employing entity. The approach is primarily factual and is based on the totality of the circumstances presented by each case. The Court instructed that the focus should be upon whether there is “substantial continuity” between the enterprises, and whether a majority of the new employer’s employees had been employed by the predecessor. The Court held that, in these circumstances, when one employer takes over the union-represented bargaining unit employees of another employer, it is bound to recognize the union as the collective-bargaining representative of the employees in the unit.

The Supreme Court revisited the successorship issue in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), where it reiterated the requirement that a “substantial continuity” must exist between the enterprises before warranting a finding that the new employer is a successor. The Supreme Court in *Fall River*, *supra* at 43, summarized the factors relevant to determining when substantial continuity exists as follows:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

The Court also stated that the Board will analyze these factors primarily from the perspective of the employees, that is, “whether ‘those employees who have been retained will . . . view their job situations as essentially unaltered.’” *Id.*, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). The Court reiterated that although each factor must be analyzed separately they must not be viewed in isolation and, ultimately, it is the totality of the circumstances that is determinative. See *Fall River*, *supra*.

The facts herein show that the Respondent, prior to July 1, 1993, operated as a health care services insurance plan. After July 1, 1993, the Respondent continued the same operations. The Respondent remained in the same location, using the same name and offering the same services, and hired the same employees and supervisors to perform the same duties, with no hiatus in its operations. When the Respondent began operations on July 1, 1993, the clerical employees it hired had all been bargaining unit employees at Montefiore. From the perspective of the Respondent’s employees, there is no difference in

³ As found by the judge, the Respondent’s clerical employees were the unit covered by the collective-bargaining agreements between Montefiore and the Union. There is, however, no contention by any party that sales employees were part of the unit.

their job situation. Although, before July 1, 1993, the employees were considered to be employees of Montefiore, the entity for whom they worked held itself out as “The Bronx Health Plan” and as of July 1, 1993, and thereafter, the entity continued to hold itself out as “The Bronx Health Plan.” Therefore, we find that there was substantial continuity between the employing enterprises.

The chief factor relied on by the administrative law judge in finding that the Respondent was not a successor is that the group of union-represented employees hired by the Respondent is only a small fraction of all the bargaining unit employees covered by the collective-bargaining agreement between the Union and Montefiore. The judge, citing *Nova Services Co.*,⁴ and *Atlantic Technical Services Corp.*,⁵ opined that it was not fair to presume that the Union maintained continuing majority status among the unit employees because of the “difference in the types of the employees involved, the extreme diminution in the size of the proposed unit, and the fact that . . . the Respondent . . . and Montefiore are engaged in two separate kinds of businesses.”

It is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to a sale or transfer to a new owner so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation.⁶

As set forth in *Mondovi Foods Corp.*, 235 NLRB 1080, 1082 (1978), cited by our dissenting colleague, the Board’s key consideration is “whether it may reasonably be assumed that, as a result of transitional changes, the employees’ desires concerning unionization [have] likely changed.” [Footnote omitted.] Once it has been found that the purchaser has hired a sufficient number of former employees of the seller to constitute a majority of the purchaser’s employee complement in an appropriate unit, the Board “considers such circumstances as whether or not there has been a long hiatus in resuming operations, a change in product line or market, or a change of location or scale of operations. . . . However, a change in scale of operation must be extreme before it will alter a finding of successorship.” *Id.*⁷ We find that none of the factors

discussed in *Mondovi* are present here. There was no hiatus in operations, no change in product line or market, and no change in location. And, from the perspective of the Respondent’s employees, there was no change in the scale of the operation. Thus, there was nothing in the transitional changes that reasonably “would undermine a finding that the employees’ desires concerning union representation have remained unchanged.” *Mondovi*, *supra*.⁸

Assuming the validity of the cases relied on by the administrative law judge and our dissenting colleague, they are distinguishable in any event. In *Nova Services*, *supra*, the Board found no successorship because the change resulted in what the Board found was an “inappropriate ‘fragmentation’ of a previously homogenous grouping of employees.” Here, there was no “inappropriate ‘fragmentation,’” and the unit is unquestionably appropriate.

As our dissenting colleague concedes, “Montefiore was the employer of the clerical employees for the 4-year period prior to the Respondent’s takeover,” during which time “they were covered by the terms of the Union-Montefiore collective-bargaining agreement.” In addition, the clerical employees “perform[ed] a function distinct from that which the Montefiore unit traditionally has provided.” Furthermore, while employed by Montefiore, the clerical employees were physically separated from the remainder of the Montefiore unit, and there was no employee interchange. Thus, the clerical employees who subsequently became employees of The Bronx Health Plan had always been a separate part of a large and diverse unit. The fact emphasized by our dissenting colleague—the clerical employees “are now in a small unit consisting only of themselves”—does not change their position vis-à-vis representation by the Union.⁹

previous employees, a majority of the unit complement for the operation which it purchased.” *Mondovi*, 235 NLRB at 1082 fn. 8.

⁸ In concluding otherwise, the judge and our dissenting colleague rely heavily on the Respondent’s hiring of only 16 of the 3500 Montefiore bargaining unit employees and on the Respondent’s providing services that are different from those of Montefiore. However, the judge and our dissenting colleague fail to appraise these factors in the totality of the circumstances of this case. Thus, the record shows that the clerical employees Montefiore provided the Respondent never had any substantial contact with the rest of the Montefiore unit. Further, the record is clear that the Respondent was created as a completely separate corporation from Montefiore, that the Respondent was designed to engage in a completely separate business activity, and that the Respondent’s arrangement with Montefiore was always intended to be of limited duration. Therefore, on July 1, 1993, when the Respondent began functioning with its own workforce, from the perspective of the 16 clerical employees retained, there had been no material changes in their job situations. Consequently, there is no reason to believe that their views on union representation had changed.

⁹ As we did in *M.S. Management Associates, Inc.*, 325 NLRB 1154, 1156 fn. 9 (1998), we reject our dissenting colleague’s premise and conclusion that “if there is no successorship in a case where a homogeneous unit remains homogeneous, a fortiori there is no successorship where a multi-classification unit is fragmented into a distinct, [single]-classification unit.” As set forth above, we find that the predecessor’s

⁴ 213 NLRB 95 (1974).

⁵ 202 NLRB 169 (1973).

⁶ *Saks & Co. v. NLRB*, 634 F.2d 681, 685 (2d Cir. 1980); *Zims Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1140–1142 (7th Cir. 1974), cert. denied 419 U.S. 838; *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981); *Boston-Needham Industrial Cleaning Co.*, 216 NLRB 26, 28 (1975).

⁷ As support for this latter proposition, the Board in *Mondovi* relied on *Ranch Way, Inc.*, 183 NLRB 1168 (1970), *enfd.* 445 F.2d 625 (10th Cir. 1971), vacated 406 U.S. 940 (1972), on remand 81 LRRM 2736 (10th Cir. 1972), successorship finding reaffirmed in 203 NLRB 911 (1973) “in which respondent was found to be a successor although it had purchased only 1 of the seller’s 16 operations. The seller had a collective-bargaining agreement with the union covering 800 production and maintenance employees; respondent hired 18 of the seller’s

In *Atlantic Technical*, supra, the Board found that successorship had not been established, in part, because of the circumstances under which the employees initially became represented. The alleged successor took over a tiny portion of what had previously been a Trans World Airlines companywide unit of mechanics and related classifications covering approximately 14,000 employees. The unit acquired by the alleged successor consisted of approximately 41 employees doing mail sorting and distribution, who had been originally brought into the larger unit as a voluntarily recognized “accretion” to the overall unit. Apart from the large numerical differences between the original mechanics’ unit and the alleged successor unit of mail handlers, the Board, in finding no successorship relationship, placed special emphasis on the fact that there had been no showing of majority sentiment for the union by the employees in the accreted mail handlers’ unit.¹⁰ By contrast, here there is no issue of accretion at all. The Board in *Atlantic Technical* also relied, inter alia, on the fact that TWA was a large company engaged primarily in transportation and related fields, was regulated by the Railway Labor Act,¹¹ and had contracts throughout the country. It had an agreement with the union covering a systemwide craft or class of 14,000 TWA mechanics and related employees located all around the country. That nationwide craft or class included 1100 employees at the Kennedy Space Center, 41 of whom became the employees of Atlantic Technical. In contrast to TWA, Atlantic Technical, the alleged successor, was a small organization, recently organized to perform small technical support service contracts, such as the mail and distribution function at the Kennedy Space Center.

No such obvious contrasts exist in the instant case between the predecessor and successor enterprises. The Respondent’s employees were not fragmented from a very large, nationwide unit and remain employed by an employer engaged in health care related work in New York City. Unlike the TWA-Atlantic Technical distinction, we find that there is substantial continuity between the two enterprises, and that the diminution of unit scope under these circumstances is insufficient to meaningfully affect the way the employees perceive their jobs or sig-

nificantly affect employee attitudes concerning union representation.

For these reasons, we conclude that there exists the requisite substantial continuity in the employing enterprise. Thus, if the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation, then the Respondent must be found to be a successor to Montefiore.¹² Here, the unit is clearly appropriate. In addition, because all of the employees in the Respondent’s clerical unit were formerly employed by Montefiore, we find continuity in the workforce. Accordingly, we conclude that the Respondent is a successor employer with the attendant obligation to recognize and bargain with the Union. See *M.S. Management*, supra.

The Court in *Fall River* also approved of the Board’s “continuing demand” rule that provides that a Union’s premature demand for bargaining, although rejected by the employer, continues in effect until the successor acquires a “substantial and representative complement” of employees.

On June 9, 1993, the Union made a proper demand for bargaining to the Respondent. The Respondent declined to bargain with the Union, stating that it is a separate entity from Montefiore with no relationship with the Union, and therefore, had no obligation to bargain or assume the terms of the collective-bargaining agreement between Montefiore and the Union. The Respondent added that until the Union petitioned to represent its employees and was duly elected by the employees as their collective-bargaining representative, the Respondent would not recognize or bargain with the Union.

We find that the Union’s June 9 demand, although not repeated after July 1, 1993, operated as a continuing demand to represent and bargain collectively with the Respondent for the unit employees. Therefore, we find that the Respondent’s refusal to recognize and bargain with the Union on and after July 1, 1993, violated Section 8(a)(5) and (1) of the Act.

On July 6, after the Respondent began functioning as an independent employer, Bluestone circulated a memorandum outlining to the employees the leave policy the Respondent planned to implement. This leave policy was developed without the Respondent first bargaining with the Union. The content of the July 6 memo to employees shows that this was the Respondent’s first announcement of these terms. We find that the Respondent, by making unilateral changes in the terms and conditions of employment for the unit employees at a time when it was obligated to bargain with the Union, violated Section 8(a)(5) and (1) of the Act.

unit here was not inappropriately fragmented, but was divided along a historical line of separation, resulting in a new appropriate unit of clerical employees with common duties and interests.

¹⁰ Chairman Gould believes that *Atlantic Technical*, supra, was incorrectly decided and would overrule that case.

¹¹ Although not determinative, the Board relied on this factor, among others, in finding no successorship in *Atlantic Technical*. See 202 NLRB at 170. See also *M.S. Management*, supra (stating that the Board in *Atlantic Technical* relied, inter alia, on the fact that the predecessor “was regulated by the Railway Labor Act”). Of course, in determining whether there has been a successorship, nothing in *Atlantic Technical* indicates that units established under the Railway Labor Act are to be treated differently from units established under the NLRA.

¹² *Stewart Granite Enterprises*, supra.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, The Bronx Health Plan, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by The Bronx Health Plan, excluding guards and supervisors as defined in the Act.

4. The Respondent, The Bronx Health Plan, is a successor employer of Montefiore Medical Center.

5. The Respondent has refused, since July 1, 1993, to recognize and bargain with the Union as the exclusive collective-bargaining representative for its unit employees.

6. The Respondent unilaterally changed the terms and conditions of employment for the unit employees without notice to the Union and without providing an opportunity for the Union to bargain over the changes.

7. By the acts and conduct described above, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act which have affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and by unilaterally changing the terms and conditions of employment for its employees, we shall order it to cease and desist and take certain affirmative action necessary to effectuate the policies of the Act. We shall order the Respondent to recognize and, on request, bargain with the Union as the collective-bargaining representative of the unit employees, and if an agreement is reached, reduce the agreement to a written contract. In addition, the Respondent must rescind, on request by the Union, any departures from the terms and conditions of employment, including rates of pay and benefits unilaterally effected, and must make the employees whole for any loss of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, The Bronx Health Plan, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with 1199, National Health and Human Service Employees Union, as the exclusive collective-bargaining representative for the unit employees in the following appropriate unit:

All employees employed by The Bronx Health Plan, excluding guards and supervisors as defined in the Act.

(b) Unilaterally changing the terms and conditions of the unit employees' employment without first bargaining to impasse with the Union with respect to the terms and conditions that it implemented.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and on request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Upon request, rescind all unilateral changes in the terms and conditions of employment.

(c) Restore, to the extent requested by the Union, all terms and conditions of employment that were in effect as of July 1, 1993, before the unilateral changes were made.

(d) Make whole any employees who may have been detrimentally affected by the changes in terms and conditions of employment, with interest on any monetary losses the employees may have suffered, in the manner set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 1993.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

I agree with my colleagues that the Respondent, The Bronx Health Plan, is not a joint employer with Montefiore Hospital. Accordingly, the Respondent is not bound to the terms of the union contract covering that hospital. Contrary to the majority, however, I agree with the judge that the Respondent is also not a *Burns*¹ successor to Montefiore. Thus, the Respondent is not required to recognize and bargain with the Union. Accordingly, I would dismiss the complaint alleging that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union, and by making unilateral changes.

Under the “successorship” doctrine, an employer that takes over the operations and employees of a predecessor employer is required to recognize and bargain with the union representing the predecessor’s employees only where: (1) there is a substantial continuity between the predecessor’s and the employer’s operations; and (2) a majority of the new employer’s employees, in an appropriate unit, consist of the predecessor’s employees. *Burns*, supra; *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). In determining whether successorship has been established, the key inquiry is whether, as a result of transitional changes between the predecessor and the new employer, it reasonably may be presumed that the employees of the new employer desire the same union representation. See, e.g., *Mondovi Foods*, 235 NLRB 1080, 1082 (1978). Under this analysis, I agree with the judge that the Respondent is not a *Burns* successor.

The judge found that the Respondent was not Montefiore’s successor because he found no substantial continuity in the employing entity. In this regard, the judge found that the 16 employees whom the Respondent hired, “constitute[d] a tiny fraction (.05 percent) of the [Montefiore] bargaining unit,” and were scattered among a few of the hundreds of job classifications encompassed in the Montefiore unit. Given the extreme diminution of the Respondent’s unit, and the fact that it was functionally distinct and “not a miniature version of the Montefiore bargaining unit,” the judge concluded that it could not “fairly be presumed that the Union had a continuing majority status amongst this small group of people.” In reaching this conclusion, the judge relied on *Nova Ser-*

vices Co., 213 NLRB 95 (1974), and *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973), *enfd.* 498 F.2d 580 (D.C. Cir. 1974), where the Board and court found that successorship had not been established because of the lack of continuity in the employing enterprise.

I agree with the judge. Thus, even assuming, *arguendo*, that the clerical employees hired by the Respondent constitute a separate appropriate unit,² I find that successorship fails because there is no “substantial continuity” in the employing enterprise.

In approximately 1989, the Respondent instituted a health maintenance organization (HMO) to contract with health care suppliers (hospitals and health care centers) to provide medical services to enrolled Medicaid recipients at fixed rates. It entered into an agreement with Montefiore whereby Montefiore would employ clerical staff to be used with respect to the Respondent’s HMO operation for a fixed term, not to exceed 5 years. After this period, the Respondent would staff the operation with its own workforce. Pursuant to this arrangement, Montefiore provided staff and management for the HMO unit until June 30, 1993. As found by the judge, based on Montefiore’s control over the essential terms and conditions of employment of the clericals assigned to the Respondent’s HMO, Montefiore remained their sole employer during this period. They were part of a Montefiore unit consisting of 3500 employees. At issue is whether the Respondent became a successor employer on July 1 when it began operating the HMO with its own employee complement. I find that it did not.

Initially, I note that there is a significant disparity both in the size and functions of Montefiore and the Respondent. Montefiore, a full-purpose hospital, has a collective-bargaining agreement with the Union covering a unit of 3500 employees. These unit employees are divided among hundreds of job classifications—running the gamut from pot washers to pharmacists—and they share the common purpose of providing health care and ancillary support services to Montefiore patients.

Conversely, the Respondent provides services that are significantly smaller and very different from those of the hospitalwide Montefiore unit. In addition, the Respondent’s HMO operation is one that Montefiore Hospital traditionally has not provided (except for staffing it from 1989–1993), and its client base is not confined to Montefiore.

As noted, supra, if the new employer is engaged in a business different from that of the predecessor employer, that fact militates strongly against a finding of successorship. My colleagues concede, as they must, “that the Respondent was designed to engage in a completely separate business activity” from that of Montefiore.

¹ *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

² The judge did not reach the issue of whether the Respondent’s clerical unit was appropriate. I also do not resolve that issue. However, I note that the Respondent’s workforce is not limited to clerical personnel, but also includes a sales staff that did not exist under Montefiore.

Thus, this factor in this case militates strongly against a finding of successorship.

Concededly, Montefiore was the employer of the clerical employees for the 4-year period prior to the Respondent's takeover. However, as noted above, the 17 clerical employees were only a small part of a Montefiore unit consisting of 3500 employees. Further, the Montefiore-Respondent agreement did not specify that the employees had to come from the Montefiore bargaining unit, and it did not specify any terms and conditions under which they would be employed.

During the period when Montefiore was the employer of the clerical employees, they were covered by the terms of the Union-Montefiore collective-bargaining agreement. As noted, they were part of a large and diverse unit. They are now in a small unit consisting only of themselves.

In these circumstances, I agree with the judge that it can not reasonably be presumed that, simply because the Respondent hired 16 of the 17 clerical employees that Montefiore previously had employed, those employees continue to desire the same Union representation.

My position finds ample support in *Nova Services*, supra, and *Atlantic Technical Services Corp.*, supra. Here, as in *Nova*, the Respondent hired only a few predecessor employees to perform work which constituted only a small portion of the work that the predecessor had performed. As in *Nova*, this is "too fragmentary a basis upon which to predicate a finding of legal successorship." 213 NLRB at 97.³

Similarly, as in *Atlantic Technical*, the Respondent took over only a small segment of the predecessor unit, and that segment was functionally distinct from other classifications in the predecessor unit. Under these facts, as in *Atlantic Technical*, the "size and organizational structure of the employer succeeding to the smaller unit [was] in a number of respects materially different," and this difference was a "sufficiently substantial change in the employing industry to defeat any finding of successorship." 202 NLRB at 170.

My colleagues seek to distinguish *Atlantic Technical* on the basis that the mail sorting and distribution employees in that case were originally accreted into the predecessor's unit. In my colleagues' view, this was a primary reason for the conclusion that the new employer (who took over the mail sorting and distribution operation) was not a successor. However, I think it clear that the Board's overall emphasis is not on how the employees originally came to be in the predecessor's unit, but rather whether there has been a significant change from the predecessor unit to the new employer's unit.

³ Indeed, I view this case as providing an even stronger argument against successorship than *Nova*, where both the predecessor and alleged successor performed the same janitorial-type work.

The majority also seeks to differentiate *Atlantic Technical* on the basis that there the predecessor employer was subject to the Railway Labor Act (RLA) and had contracts throughout the country. Although these are, assuredly, factual distinctions, I do not find them determinative. As to the first point, it is well settled that the fact that a predecessor was governed by the RLA is immaterial for successorship purposes. The key is whether the Board has jurisdiction over the alleged successor. See, e.g., *Boeing Co.*, 214 NLRB 541, 559 (1974). Second, although the predecessor in *Atlantic Technical* was a nation-wide company, and had other contracts, the more relevant facts were that: (1) the predecessor instituted the small, discrete mail distribution operation at a single facility where approximately 1100 union-represented mechanics and related employees were employed; (2) the alleged successor was created solely to perform the mail distribution function; and (3) the predecessor's employees whom the successor hired constituted less than 4 percent of the union-represented employees at that facility. Here, too, the Respondent was created solely to perform a limited function—which was not encompassed by the historic Montefiore bargaining unit—and its workforce comprised only a small fraction of the diverse Montefiore unit.⁴

The majority argues that successorship is established because the 16 Montefiore employees hired by the Respondent for HMO work had been isolated from other unit employees under Montefiore. According to my colleagues, this demonstrates that the sentiments of the 16 employees regarding union representation would remain unchanged. In my view, this misses the mark. For purposes of assessing whether a successorship obligation exists, one compares the unit before and after the transfer, in order to determine whether the unit has changed. Here, we compare a multithousand, multiclassification unit with a small HMO support group. Further, as with the mail distribution work in *Atlantic Technical*, the HMO work which the 17 Montefiore employees performed prior to July 1993 was not traditional unit work.

The majority also argues that *Mondovi*, supra, supports its position because there—when resolving the successorship issue—the Board considered such factors as whether there had been changes in the product, market, and location of production. Applying these factors to this case, my colleagues argue that successorship must be found. I disagree. Clearly, the principal business of Montefiore is different from the principal business of the

⁴ In at least one respect *Atlantic Technical* appears to present a more compelling case for successorship than the instant case. In *Atlantic Technical*, the mail and distribution function acquired by the alleged successor continued, under the new employer, to provide direct support services, in the same location, for part of the bargaining unit. Here, conversely, the HMO services provided by the Respondent were located in a facility separate from the Montefiore Hospital, and were geared to a client base wholly distinct from that hospital.

Respondent. Further, the factors cited in *Mondovi* are among the many considerations relevant to the successorship issue. They are, however, neither exhaustive nor determinative. Rather, in this highly fact-intensive area of the law, all relevant facts must be considered in determining whether it reasonably may be presumed that employees of the new employer desire to continue the prior representation. Based on all the relevant factors, I find that successorship was not established.

The majority also cites *Mondovi* for the proposition that “a change in scale in operation” will ordinarily not preclude a finding of successorship. However, the instant case does not involve a mere “change in scale of operations.” Rather, the nature of the enterprise has changed and so too the complete character of the unit has changed. This is not a situation where a large homogeneous unit simply changed to a smaller homogeneous unit. Instead, of the thousands of Montefiore employees, spanning hundreds of categories of hospital health care and related support services, the Respondent hired only 16 unit employees, and those 16 perform a function distinct from that which the Montefiore unit traditionally has provided. Phrased differently, the unit has not simply grown smaller; it has fragmented.⁵

My colleagues assert that “there had been no material change in [the] job situations” of the employees involved herein. The question, however, is whether there has been a change in their union representation situation. Where, as here, a relative handful of employees in a very large unit become a small unit unto themselves and become employed by an employer with a very different business purpose, I would not presume that they continue to desire union representation.

In sum, I rely on the facts that the character of the unit has changed, the size of the unit has changed, and the nature of the employer has changed. More particularly, I note that:

1. Under Montefiore, the unit was a diverse one, with hundreds of classifications. Under the Respondent the unit is restricted to the narrow clerical category.
2. Under Montefiore, the unit had 3500 employees. Under the Respondent the unit has 16 employees.
3. The business of Montefiore was operating a large, complex hospital. The business of the Re-

spondent is offering distinct HMO services to a different client base.

Accordingly, for all of these reasons, as well as those cited by the judge, I find that the Respondent was not a successor to Montefiore. Thus, I would let these employees decide for themselves whether they want union representation. I would dismiss the complaint.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively in good faith with 1199, National Health and Human Service Employees Union, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All employees employed by The Bronx Health Plan, excluding guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change your terms and conditions of employment without first bargaining to impasse with the Union with respect to the terms and conditions that we implemented.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and on request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an agreement is reached, embody the agreement in a signed contract.

WE WILL, on request, rescind all unilateral changes, and restore, to the extent requested by the Union, all terms and conditions of employment that were in effect as of July 1, 1993, before the unilateral changes were made.

WE WILL make any employees whole who have been detrimentally affected by the changes in terms and condi-

⁵ As noted, *supra*, in *Nova*, the predecessor's unit consisted of a homogeneous unit of employees (janitors) and the new employer's unit consisted of a smaller unit of janitors. The Board held that the new employer was not a successor. In the instant case, the predecessor's unit consisted of hundreds of categories of patient care and support positions, all related to services provided for patients at the Montefiore Hospital. The new unit, conversely, provides distinct HMO services to a different client base. In my view, if there is no successorship in a case where a homogeneous unit remains homogeneous, a fortiori there is no successorship where a multiclassification unit is fragmented into a distinct, single-classification unit.

tions of employment, with interest on any monetary losses the employees may have suffered.

THE BRONX HEALTH PLAN

Terry A. Morgan Esq., for the General Counsel.
Don Carmody, Esq. (Carmody & Collazo), for the Respondent.
Gwynne A. Wilcox Esq. (Levy, Pollack & Ratner), for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on October 31, and November 1 and 2, 1994. The charge was filed on November 23, 1993, and the complaint was issued on March 30, 1994. In substance, the complaint alleges:

1. That from March 27, 1989, until June 30, 1993, The Bronx Health Plan (TBHP), a not-for-profit corporation, and Montefiore Hospital were parties to a management services agreement pursuant to which Montefiore provided planning, development, and management services for the Respondent. It is alleged that this contract provided, among other things, that Montefiore would be responsible for the hiring and supervision of all personnel required for the conduct of TBHP's activities.

2. That Montefiore has maintained a collective-bargaining relationship with the Union in a unit consisting of all service and maintenance employees, clerical employees, licensed practical nurses, technical employees, social workers, social work supervisors, pharmacists, dietitians, and occupational and speech therapists employed by Montefiore, excluding supervisory, confidential, executive and managerial employees, physicians, dentists, registered nurses, students (interns), part-time employees who work less than one-fifth time and temporary employees.

3. That the most recent contract between Montefiore and the Union runs from July 1, 1992, through June 30, 1995.

4. That the clerical employees of Montefiore who were assigned to TBHP were covered by the aforesaid contract and that Montefiore and the TBHP were joint employers insofar as such employees.

5. That on March 27, 1993, TBHP terminated the management agreement with Montefiore.

6. That since June 30, 1993, TBHP hired the people previously employed by Montefiore and became the "successor" to Montefiore for a unit to consist of all TBHP employees, excluding guards and supervisors. (Unlike the bargaining unit at Montefiore which contains all kinds of health care workers, the alleged unit here is one containing only clerical workers.)

7. That since June 9, 1993, TBHP has refused to recognize and bargain with the Union.

8. That since June 1, 1993, TBHP has unilaterally refused to apply the contract terms and conditions that had been in effect per the contract between the Union and Montefiore.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a New York not-for-profit corporation which, as more fully described below, provides medical insurance services for indigent people. Annually, it has gross revenues in excess of \$1 million and purchases goods and services valued in excess of \$50,000, directly from firms located outside the State of New York. Based on the Board's retail standards, which are applicable to insurance companies, I find that it the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. *Insurance Workers Local 60 (John Hancock)*, 236 NLRB 440 (1978). I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

For many years, the Union has been the collective-bargaining representative of several thousand employees of Montefiore Hospital. The most recent contract between that employer and the Union runs for a term from July 1, 1992, to June 30, 1995. In major part, this contract was negotiated through an association called the League of Voluntary Hospitals and Homes of New York (the Association), although negotiations over local issues were conducted between the Union and individual employers. Notwithstanding Montefiore's membership in the Association, it appears that the intent of the Union and the employer members of the Association was that each Hospital was to comprise a separate collective-bargaining unit.

In essence, the Montefiore bargaining unit consisted of about 3500 employees in nine major categories and further broken down into several hundred separate job classifications. (See G.C. Exh. 3, which establishes the pay rates for a multitude of job classifications from, for example, service employees such as pot washers and cooks, to medical support personnel such as licensed practical nurses, social workers, and pharmacists.)

In the mid-1980s, a private foundation in conjunction with some people at Montefiore conceived of the idea of establishing a not-for-profit health insurance company that would provide an alternative mechanism for providing health insurance to poor people who, in the main, were on welfare and covered by Medicaid. Pursuant to a grant by the foundation to Montefiore, the latter hired a small group of people headed up by Maura Bluestone who was put into Montefiore's office of planning.

On February 7, 1986, the Bronx Health Plan (TBHP), was incorporated and its initial board of directors consisted of five officers of community health care providers.¹ During this year,

¹ These were Stanley E. Harris, MD., of the Montefiore Comprehensive Health Care Center; Robert Massad, MD., of the Montefiore Family Health Center; Verona Greenland, of the Morris Heights Health Center; Angel Quinones, of the Morrisania Neighborhood Family Care Center; and Gloria Perry, of the Dr. Martin Luther King Jr., Health Center. The Certificate of Incorporation was signed by Maura Bluestone and Henie Lustgarten, both listed as part of Montefiore's office of planning. In a certain sense, I suppose one could say that TBHP was conceived of and created as the brainchild of Montefiore, inasmuch as Bluestone did much of the work and was employed during the time as part of Montefiore's planning staff. On the other hand, it is obvious to me that TBHP was created as a completely separate corporation designed to engage in a completely separate business activity from Montefiore (selling medical insurance as opposed to providing medical services). Although a couple of TBHP's Board members have been affiliated with Montefiore, a majority of its Board members have not.

TBHP obtained the necessary licenses to do business from the State of New York and negotiated a contract with the city of New York to provide its prospective clients with health insurance coverage in lieu of Medicaid. It also acquired a location on Fordham Road in the Bronx and entered into contracts with hospitals (including Montefiore), and other community health centers to provide medical services for its clients. In this respect, the difference is that under Medicaid, medical providers are paid for specific individual services (essentially fee for service), whereas under the alternative, TBHP would contract with providers for a specified fee per enrollee, irrespective of the particular services performed. That is, TBHP was to be a health maintenance organization (HMO), which, with the monies provided by the State to each enrolled person, would contract with hospitals, doctors, etc., to provide medical services on a fixed rate per person. To make ends meet, the problem for TBHP was to negotiate cost-effective deals with providers in consideration for which the providers would have a group of potential patients who would be required to use the contracted for services (i.e., the clients could only choose medical providers who contracted with TBHP).

In February 1987, 1 year later, TBHP opened its doors for business and started to solicit and accept applicants. In what, at least to me, was an unusual arrangement, TBHP commenced operations with *no* employees of its own. That is, an arrangement was made so that Montefiore provided *all* of the managerial and other staff for TBHP (mostly clerical workers). Maura Bluestone, who had been the person most instrumental in setting up TBHP, then became the person responsible for its overall operations while still an employee of Montefiore. This arrangement was memorialized in a contract between the board of directors of TBHP and Montefiore dated March 27, 1989. Thus, in consideration of a specified fee, Montefiore contracted with TBHP to provide all employees, including managerial employees, to do all of the work required by TBHP. By the terms of the contract, this arrangement was to be of a limited duration as TBHP intended to convert itself, no later than 5 years' hence, into a regular employer, having regular employees. To get ahead of the story, this occurred in July 1993, when the employees of Montefiore working at TBHP were laid off by the former and hired by the latter.

The contract between TBHP and Montefiore contained the following provisions which are cited by the General Counsel as being relevant to this case:

Subject to the direction of TBHP Board of Directors . . . Montefiore will be responsible for the following areas: . . . i. Hiring and supervision of all personnel required for the conduct of the foregoing activities and for the supervision of any duties which Montefiore may elect to subcontract out and the selection and supervision of all subcontractors;

....

All actions delegated to Montefiore in paragraph two (2) and by any other means or agreement remain the responsibility of the Board of Directors of TBHP. The TBHP Board of Directors will retain authority to approve, revise or reject all actions of Montefiore taken on behalf of TBHP including, but not limited to the following: a. The form and content of this agreement (any renewals, extensions or modifications thereof);

....

TBHP agrees that it will at all times cooperate to the fullest extent possible with Montefiore in providing whatever assistance or information is required for Montefiore to fulfill its duties and responsibilities under paragraph 2 of this agreement.

Notwithstanding the contract's reservation of control with TBHP's board of directors, the fact remains that during the life of the agreement, Bluestone made all of the operating decisions, did the hiring and firing in conjunction with the personnel department of Montefiore, and prepared the annual budget which was reviewed and approved by the board of directors. Insofar, as the day-to-day operations of the entity, the TBHP board of directors, was not involved.

In addition to Bluestone, there was a group of clerical employees who, although employees of Montefiore, were assigned pursuant to the aforementioned contract, to work at TBHP. These people were covered by and paid in accordance with the collective-bargaining agreement between Montefiore and the Union. When new employees were required at TBHP, Bluestone made requisitions to Montefiore's personnel department and that department hired or transferred employees to TBHP operations as needed.

Despite the fact that the employees working at TBHP were all employees of Montefiore, there was no interchange between them and the other represented employees of the hospital. Moreover, as pointed out by the General Counsel, all personnel or labor relations issues affecting this group of employees was handled by Montefiore supervisors or managers. None of the Board members of TBHP had any dealings with the Union vis-a-vis these employees.

As of mid-1993, there were about 17 Montefiore clerical employees assigned to work at TBHP, all of whom worked in clerical classifications such as secretary, accounts clerks, key punch operators, etc. This comprised less than .05 percent of the Montefiore bargaining unit employees and a minuscule percentage of the job classifications covered by the labor agreement.

On March 27, 1993, TBHP by Dr. Robert Massad, its board president, notified Montefiore that it was going to terminate the contract as of June 30, 1993.

On May 26, 1993, Steven J. Delehanty, Montefiore's director of employee relations, notified the employees assigned to TBHP that their employment would be terminated with severance pay as of June 30, 1994. Maura Bluestone, who became the president and CEO of TBHP, notified the employees that they could submit job applications for consideration as TBHP employees and most of the employees assigned to this location did so and were hired.

On June 9, 1993, Union Vice President Nelson Valdez met with Bluestone and stated that he wanted to discuss the collective-bargaining agreement. He asserted the Union's position that the Union would continue to be the representative of the employees after the transition and that the collective-bargaining agreement should continue in force and effect. Bluestone responded that TBHP was a separate entity having no collective-bargaining relationship with the Union and therefore had no obligation to assume the labor agreement. The Respondent's position is that until and unless the Union wins an election to represent these employees, TBHP will not recognize and bargain with the Union.

On July 1, 1993, TBHP began operating with its own staff of managerial, supervisory sales, and clerical employees. All

agree that this transition did not involve the sale or transfer of any physical or other assets. Nor did it involve the transfer of stock or any other kinds of ownership interest. Of the 17 clerical employees working at TBHP immediately prior to July 1, 1993, 16 were hired by TBHP to perform similar clerical functions on or shortly after July 1, 1993. Although TBHP's employee staff has expanded subsequently, it seems to me that the complement of employees hired by TBHP in early July 1993 constituted a representative complement.²

III. ANALYSIS

A. The Joint Employer Issue

The General Counsel and the Charging Party assert that prior to July 1, 1993, TBHP and Montefiore were joint employers vis-a-vis the employees that Montefiore provided to TBHP and who performed the work required of that company. They argue that if the two entities were joint employers, then the contract which Montefiore maintained with the Union on behalf of this set of employees, was binding on TBHP and therefore that when TBHP severed its relationship with Montefiore and hired the employees as its own, it was bound to the existing collective-bargaining agreement between the Union and Montefiore. Thus the General Counsel cites *D & S Leasing*, 299 NLRB 658 (1990), where the Board, after finding that the subject corporations were joint employers, held that where company A terminated its subcontract with company B (whose employees were represented by a union), company A violated Section 8(a)(5) by failing to give notice to the union of its decision to terminate the subcontract. Among other things, company A was ordered not only to bargain with the union that represented company B's employees, but to honor the collective-bargaining agreement that existed between company B and the union.

In *D & S Leasing*, supra, the facts showed that although company B supplied the personnel to company A, the day-to-day supervision of this work force was directed and controlled by the management of company A. Thus, supervisors of company A gave out the work schedules, determined working hours, approved requests for time off, assigned men to train newly hired employees, and approved the hiring of company B's employees assigned to work at the premises of company A.

The issue here is whether, in the circumstances described, two separate corporate entities (TBHP and Montefiore), were joint employers vis-a-vis the employees that Montefiore provided to TBHP and who were represented by Local 1199. I don't think that they were.

In *Chesapeake Foods*, 287 NLRB 404, 407 (1987), the administrative law judge found that Chesapeake, a chicken processing plant, was the joint employer with an individual who employed teams of people who bought chickens at farms and brought them to the plant. The Board reversed the judge who used a "right of control test" and stated:

As noted earlier, we disagree with the judge's finding on the joint employer issue. In this regard, we initially

note that the judge applied an incorrect test for determining the Respondent's alleged joint employer status. Contrary to the judge, the appropriate test for ascertaining joint employer status in whether two separate entities share or codetermine "those matters governing the essential terms and conditions of employment" and to establish such status "there must be a showing that the [alleged joint] employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction. . . ." [Footnotes omitted.]

We note first that the catchers' essential terms and conditions of employment were dictated by the collective-bargaining agreement that was negotiated by Dennis with the Union. The Respondent neither negotiated nor conegotiated this agreement. . . .

Further, we find the evidence insufficient to establish that the Respondent meaningfully affected other matters relating to the catchers' employment relationship such as hiring, firing, discipline, supervision and direction. It was Dennis who hired, fired, paid the catchers, and supplied them with necessary raingear. Farmers' complaints received by the Respondent about the catchers were referred to Dennis for handling and it was Dennis, not the Respondent, who directly fired the catcher suspected of stealing. Finally, the Respondent's scheduling of the farms to be worked and its instructing the catchers in certain mechanics of catching and the number of chickens to be placed in the coops cannot be found to constitute significant control over Dennis' employees. . . .

In *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1162 (1994), a labor organization was accused of engaging in illegal secondary picketing prohibited by Section 8(b)(4)(i) and (ii)(B) of the Act. In that case, the union, which was involved in a primary dispute against a company called Drivers, Inc., picketed various sites where Pennsy Supply was engaged in supplying concrete. In its defense, the union made the argument that Pennsy Supply and Drivers Inc., were joint employers inasmuch as Drivers Inc., provided most of the truckdrivers who were used by Pennsy. Without going into a detailed description of the facts, the administrative law judge concluded that:

Evidence of minimal and routine supervision of employees, limited dispute resolution authority, and the routine nature of work assignments has been held insufficient to establish a "joint employer" relationship. . . .

On the other hand, evidence of substantial control over hiring, promotion, and the base wage rates, hours and working conditions of employees, coupled with evidence of close and substantial supervision of employees, and constant presence of supervisors with a detailed awareness and control of employees' daily activities, has been held by the Board to be sufficient to establish a "joint employer" relationship. *Quantum Resources Corp.*, 305 NLRB 759 (1991). The Board found a "joint employer" relationship in another recent case, *Continental Winding Co.*, 305 NLRB 122, 123 (1991), where even though one employer alone hired employees supplied to another and set and paid their wages, the record supported the judge's finding that the other employer to which the employees were supplied exercised sole authority to assign, schedule, and supervise the workplace conditions, and the performance of work by the employees. There, the Board said, the

²As of October 28, 1994, TBHP employed about 35 clerical employees who, for the most part, did functions similar to those that they did when the operation was contracted out to Montefiore. Thus, the clerical staff, which was the group of employees covered by the Local 1199 contract, had just about doubled since the transition on July 1, 1993. In addition, the Respondent hired other employees, the largest category being a group of about 27 people who are classified as marketing representatives and who function essentially as insurance salesmen.

supervision was more than “routine” and was not “insignificant.”

In the present case, TBHP from the commencement of its operations until July 1, 1993, essentially operated without any employees of its own as its board of directors made a contract with Montefiore to provide both the managerial/ supervisory staff and the regular employees who were to carry out the clerical functions to operate this new business. The employees who were assigned to work at TBHP were hired by Montefiore and their wages and other terms and conditions of employment were set by the collective-bargaining agreement negotiated by Montefiore and the Union. (No one from TBHP was invited to participate in those negotiations and it is unimaginable that they would have been.) The supervision of these employees was carried out by Bluestone and other supervisors who, prior to July 1, 1993, were employed by Montefiore. All hiring was done by the Montefiore’s personnel department and the settlement of grievances was done there. Although the management contract between TBHP and Montefiore gave the former a theoretical right to approve or reject Montefiore decisions, there is no evidence that this “right” was ever exercised.

B. The Successor Issue

Alternatively, the General Counsel and the Charging Party contend that TBHP is a successor to Montefiore in relation to the group of employees hired by TBHP. Arguing from the premise that TBHP is a successor, they contend that TBHP had an obligation to recognize and bargain with the Union. The Respondent, on the other hand, contends that TBHP is engaged in a totally different type of business than Montefiore and that even if it hired employees previously employed by Montefiore, TBHP cannot be considered a successor where the new unit is but a tiny fraction of the bargaining unit that was covered by the contract between Montefiore and Local 1199. In Respondent’s view, the most efficacious way of determining whether its employees want to be represented by this or any other union, is for the Board to conduct an election pursuant to the procedures established in Section 9 of the Act.³

Whether or not TBHP is a successor of Montefiore, the fact remains that absent a showing that it also was a joint employer with Montefiore or manifested its intention to retain all of the predecessor’s employees with the understanding that they would be hired subject to the terms and conditions of the predecessor’s existing collective-bargaining agreement, TBHP, even if held to be a “successor,” would not be obligated to honor the contract between Montefiore and Local 1199. *Saks Fifth Avenue v. NLRB*, 634 F.2d 681 (2d Cir. 1980). Thus, in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Court stated:

We also agree . . . that holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with terms . . . contained on the old . . . contract may make these changes impossible and may dis-

courage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm . . . [Id. at 288.]

In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the preexisting contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. . . . [Id. at 291.]

The most recent Supreme Court decision defining “successorship” is *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). In that case, the Court held that an employer which takes over the operations of another is required to recognize and bargain with a union representing the predecessor’s employees when (1) there is a “substantial continuity” of operations after the takeover, and (2) if a majority of the new employer’s work force, in an appropriate unit, consists of the predecessor’s employees at a time when the successor has reached a “substantial and representative complement.” The Court summarized a number of factors relevant to determining continuity as follows, at 43:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

Moreover, as noted by the Board in *Hydrolines, Inc.*, 305 NLRB 416, 421 (1991), the factors noted above should be assessed primarily from the perspective of the employees so as to determine if the employees retained, would view their job situations as essentially unaltered.

Both before and after the Court’s decision in *Fall River Dyeing*, supra, the Board and the Courts have grappled with cases raising the issue of what constitutes a “substantial continuity” of operations. In this context, there are a number of cases involving situations where a successor has taken over only a portion of a predecessor’s operations.⁴

In *Nova Services*, 213 NLRB 95, 97 (1974), the Board held that Nova did not have an obligation to bargain inasmuch as it took over only a “small part” of the predecessor’s business operations and therefore did not have “a substantial continuity in the employing enterprise.” In that case, the predecessor, Sanitas, employed over 300 people who were covered by a statewide union contract.⁵ When Sanitas’ contract to clean sev-

³ Pursuant to Sec. 9 of the Act, a union or an employer may file a petition asking the Board to conduct an election to determine whether the employees of a company, in an appropriate unit, wish to be represented by a union.

⁴ The Respondent argues that there can be no successorship in the present case because there was neither a change in ownership from one company to the other nor the sale and transfer of assets. This, I think is not particularly relevant so long as there is a transition between one entity and another where a set of employees is affectively transferred from the control of one to another. Thus, I do not think that the method of the transition should much matter, so long as the other criteria for finding “successorship” are present. On the other hand, I think that a transition (no matter what form it took), which resulted in a significant change of business purpose would be relevant.

⁵ The administrative law judge’s decision indicates that Sanitas was a member of a multiemployer association. It is not clear to me, however, whether the Judge concluded that the bargaining unit covered by

eral branches of a bank expired, Nova successfully bid for part of that contract. (Another company won a contract to clean most of the bank's facilities.) Nova had a total of 36 employees and used 10 to clean the bank facilities formerly cleaned by Sanitas in Worcester, Massachusetts. Of the 10, 8 were former employees of Sanitas and the Union sought to represent the 10 employees assigned by Nova to clean the bank facilities formerly cleaned by Sanitas. The Board, while acknowledging that a successorship can be found in situations where the new employer acquires less than a predecessor's entire business, or hires less than a majority of the predecessor's work force, held that Nova was not a successor because the unit sought was only a very small part of the predecessor's unit, and because a third company had taken over the bulk of Sanitas' work.

The Board reached the opposite conclusion in *Boston-Needham Industrial Cleaning Co.*, 216 NLRB 26 (1975), a case where, like *Nova*, the predecessor was also Sanitas. In that case, Boston-Needham obtained a contract from RCA to clean its facility located in Burlington Massachusetts. Sanitas which previously had the contract with RCA had assigned 37 full and part time employees to this site out of its total complement of over 300 employees. Upon taking over the contract, Boston-Needham assigned 32 of its 175 employees to this location and of these, 21 had previously been employed by Sanitas at the RCA location. Noting that Boston-Needham took over the operation with knowledge that Sanitas was a union employer, the Board concluded that the location in question constituted an appropriate single facility unit; that Boston-Needham performed "substantially identical operations" as had been performed by Sanitas and that it did so at the same location of the same customer utilizing a majority of the former Sanitas employees who had previously worked at this location. Regarding the fact that Boston-Needham took over only a portion of the Sanitas unit, the Board noted, at 28:

Nor do we find here that mere diminution in unit scope relieves the successor of his duty to bargain. Although in other circumstances we believe that it may be a relevant factor to be considered, among others, in determining whether or not a new employer is a successor, such is not the case here since we have concluded that the slight changes instituted by Respondent are not such as to affect employee attitudes significantly, and since no reasonable basis has been offered for doubting the Union's continued majority status. . . . [Citing *Zim's Foodliner v. NLRB*, 495 F.2d 1131 (7th Cir. 1974).]⁶

the collective-bargaining agreement comprised all of the janitorial workers employed by the members of the Association or just the 300 people employed by Sanitas throughout Massachusetts.

⁶ In *Zim's Foodliner*, supra at 1141, the court dealt with a situation where a purchaser, (Zim's), took over one store of the predecessor's multistore unit and argued that it was not a "successor" because of the reduction in the size of the bargaining unit. The court, relying on *NLRB v. Armato*, 199 F.2d 800 (7th Cir. 1952), rejected this argument finding that the Board could treat a much-reduced bargain unit as a miniature of the former unit. In context, it seems that the court was concluding that if a majority of the employees in the smaller unit came from the predecessor, then it would presume that the former employees in the smaller unit would support the union to the same extent that employees would in the larger unit. This seems to rely on the principle that the employees in an existing represented unit are presumed to want union representation absent objective evidence to the contrary. Cf. *Brooks v. NLRB*, 348 U.S. 96 (1954), which describes some of the Board's rules regarding presumptions of majority representation.

In *Stewart Granite Enterprises* 255 NLRB 569 (1981), the predecessor operated a quarry and a plant (which were geographically separate), where the employees of both were represented by a single union in a combined collective-bargaining unit. The purchaser took over the factory only and, after a brief hiatus, hired many of the predecessor's plant employees over the first month of operations. By the end of the month, the purchaser's complement of production and maintenance employees consisted of about 27 employees, of which 17 had previously been employed by the seller. While there were some minor changes, the basic operation of the plant remained the same as did the job functions of the employees. As in *Zim's*, the purchaser argued that it was not a successor because it had taken over only a fragment of the seller's business. (The decision does not indicate the number of employees in the seller's combined bargaining unit.) Finding that the changes instituted by the buyer were insignificant, that a majority of the new complement consisted of the predecessor's employees, and that the existing production and maintenance group was a "classically" appropriate bargaining unit, the administrative law judge found that the buyer was obligated to recognize and bargain with the Union. At footnote 20, the administrative law judge distinguished the case from the facts of *Nova Services Co.* supra, and *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973).

A more recent case, *Hydrolines, Inc.*, supra, also stands for the proposition that the mere fact that the succeeding unit is smaller than the original one, is not, of itself, sufficient to defeat a successorship claim. In that case, the predecessor, which operated a ferry service, had a total complement of 26 bargaining unit employees. The successor took over the operation of several vessels and employed 13 people, of which 7 were hired from the seller. As in *Zim's* and *Stewart Granite*, the purchasing employer was engaged in the same business as the seller and made insubstantial changes in the manner in which it was operated.

In *Atlantic Technical Services Corp.*, supra, the Board found no "successorship" on facts more closely paralleling the instant case than the other cases cited above. In that case TWA (the predecessor) had a nationwide collective-bargaining agreement with the union covering a unit of mechanics and related classifications consisting of about 14,000 employees. In 1964, TWA received a contract to perform services at the Kennedy Space Center (KSC), and extended its nationwide collective-bargaining agreement to about 1100 employees that it hired to work at the Space Center. Later that year, TWA hired an additional 41 employees to perform mail and distribution functions at the Space Center and the collective-bargaining agreement was also extended to them. In February 1971, Atlantic Terminal, a newly formed corporation, successfully bid to perform the mail and distribution functions at the Space Center. Without significant change in operations, Atlantic utilized 27 of the 41 former TWA employees who had previously done this work. In finding that Atlantic was not a successor, the Board stated at 170:

1. While we agree with the Administrative Law Judge that the diminution in the scope of a unit "does not operate in any relevant fashion to preclude the lesser unit from being appropriate," we believe that it is a relevant factor to be considered, among others, in determining whether or not a new employer is a successor. And where, as here, in addition to that factor, the size and organizational structure of the employer succeeding to the smaller unit is in a

number or respects materially different, there may well be a sufficiently substantial change in the nature of the employing industry to defeat any finding of successorship.

Respondent's assumption of the mail and distribution services . . . amounts to only a small fraction of the work performed by the company wide unit recognized by TWA. The entire complement of employees hired by Respondent, 41, constituted less than 4 percent of the total number of 1,100 formerly employed by TWA at KSC and, of those 41, only 27 came from the former TWA Unit. Thus, the former TWA Unit became doubly diluted. Moreover, TWA was a large company engaged primarily in transportation and related fields, was regulated under the Railway Labor Act, and had contracts throughout the country. In contrast, Respondent is a small organization, just recently organized . . . whose only contract, as of the time of the hearing in this case, was that involved herein. There is obviously a substantial difference between the employer-employee relationship in a large corporation and that characteristic of a small operation such as Respondent's. [Footnote omitted.]

Lastly, the validity of the presumption of the continuing majority status of the Union is especially put in question where, as here, the portion of the former unit taken over by the new employer was originally accreted to the larger unit, and there is no showing that a separate and independent majority status in the smaller unit was established at the time of the accretion.

The facts in the present case are not identical to those in either *Nova Services Co.*, supra or *Atlantic Technical Services Corp.*, supra. But they are, in my opinion, mighty close.

In the present case, TBHP took over the operations that had previously been performed by managerial, supervisory, and about 17 clerical employees who had been employees of Montefiore and who, while working at TBHP's premises, were covered by a collective-bargaining agreement between Montefiore and Local 1199. Although these employees were assigned to do clerical work which in many respects was similar to that which

might be done at Montefiore (for example working on insurance claims), it must be remembered that at TBHP they were functioning for a completely different type of employing entity. Montefiore runs a hospital whereas TBHP operates an insurance company. These two companies are not engaged in the same industry.

Further, the group of employees here constitutes a tiny fraction (.05 percent) of the bargaining unit covered by the collective-bargaining agreement between the Union and Montefiore. Moreover, the bargaining unit at Montefiore comprises hundreds of job classifications and these are far in excess of the clerical classifications employed at TBHP. The point is that TBHP is not, in my opinion, a miniature version of the Montefiore bargaining unit where it could reasonably be presumed that the employees in the smaller version want union representation to the same extent desired by employees in the larger. Because of the difference in the types of employees involved, the extreme diminution in the size of the proposed unit, and the fact that TBHP and Montefiore are engaged in two separate kinds of businesses, I don't see how it can fairly be presumed that the Union had a continuing majority status amongst this small group of people.

In conclusion, where in the unusual circumstances such as these, the transition from one employer to another, entails such a significant change in the employing entity and such a substantial change in the size and shape of the bargaining unit, it seems to me that the better solution for resolving whether the employees wish to have union representation, would be to conduct an election pursuant to the procedures established in the National Labor Relations Act. Had that been done in this case, the outcome would probably have been determined within 2 to 3 months after July 1, 1993. It is now February 1994.

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]